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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

In re HANNAH A., a Person Coming  
Under the Juvenile Court Law.

ALAMEDA COUNTY SOCIAL  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

AMELITA A. et al.,

Defendants and Appellants.

A101474

(Alameda County  
Super. Ct. No. 185757)

This is an appeal from an order in which the juvenile court found that it had jurisdiction over Hannah A., a minor whom the Alameda County Social Services Agency (the agency) alleged had been molested by her father. We hold that the juvenile court did not abuse its discretion in so finding, and affirm.

**BACKGROUND**

On October 21, 2002, a juvenile dependency petition was filed alleging that Hannah came within the jurisdiction of the juvenile court under Welfare and Institutions Code section 300, subdivision (d) because she had been sexually abused.<sup>1</sup> Hannah was seven years old at the time. The petition alleged that she had touched her classmates in sexually inappropriate ways, that she had twice tried to touch the genital area of a female

<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

teacher, that she had hugged a male teacher's leg and tried to touch his penis several times, and that on October 17, 2002 she "stated that her father has touched her genital area with his penis, and that she was fearful of her father." Hannah was removed from her home based on her statement that "she has been touched in a sexual manner by her father," and the matter was set for a combined jurisdictional and dispositional hearing.

Susan Pulido, an instructional assistant at Hannah's school, testified at the hearing. She stated that on October 4, 2002, she "was stooping over . . . and all of a sudden Hannah . . . was like there in front of me and her hand started going up like my legs and I stopped her and I jumped up and I explained to Hannah that you do not touch people; you keep your hands to yourself." Pulido explained that Hannah's hands were on the inside of Pulido's leg just above her knee, and that as soon as she felt them there, she removed them. Pulido also testified that on October 8, Hannah pointed at Pulido's genitals, and Pulido believed that Hannah was going to try to touch her. Pulido told Hannah, "no Hannah, don't touch." Pulido was not able to estimate how far away Hannah's hand was, but she believed that had she not stopped her, Hannah would have touched her genital area. Pulido did not ask Hannah what she was doing or why she was doing it. Nothing further occurred during that incident. This testimony contradicted the detention report prepared by the social worker, which stated that Pulido would testify that "Hannah approached her, placed her hands on Ms. Pulido's genital area with her hands."

Pulido also testified that a few weeks before the hearing, she observed Hannah approach a boy during a physical education class "like she was going to put her hand on . . . the boy's privates." Pulido testified that Hannah "had to be held back . . . ." She also testified that Hannah told her that her father hit her and pulled her hair, and that she did not like her father. Finally, Pulido testified that Hannah was withdrawn and "closed-in" until she was put in foster care, at which time she began participating in class and was "smiling and playing and doing her work."

David Elder, Hannah's teacher, testified that at the beginning of the school year, when Hannah arrived at school in the mornings "she would hug my leg and often reach out and touch my penis." This occurred twice during the first week of school. He began

to avoid Hannah's hugs by kneeling or bending and reaching out to Hannah with his hands in order to stop the inappropriate behavior. He estimated that in all, Hannah touched his penis five times. When he told Hannah not to touch him there, she "smiled and said, 'okay' " but did touch his penis again. Elder agreed that the touching "could have been just a natural hug of a child of her height and that she was not intentionally touching" him, because Hannah was touching him from the side. When Hannah hugged him from the side, she did not move her hands to contact his penis. He could not say whether the touching was merely a misplaced hug and therefore unintentional. This testimony contradicted the statement in the detention report that Elder would testify that when Hannah "would hug his leg, she would raise her hands to try to touch his genital area." Elder discussed the incidents with his assistant, the school principal and the counselor a few weeks later when he noticed that Hannah was withdrawn and he saw her slap or pat another boy "on his bottom." Elder acknowledged that when Hannah touched the boy that it "could have been . . . a slappy touch . . . and not inappropriate behavior," and that it was merely the fact that the touch was on the boy's bottom that made him believe it was inappropriate. Elder saw no other incidents of Hannah touching another child inappropriately. He testified that Hannah is an affectionate child who likes to give hugs. If the physical education teacher felt that Hannah were behaving inappropriately he would have contacted Elder as Hannah's primary teacher, but he had not done so. Elder testified that he has been teaching since 1975 and that he has never had a child touch him on his penis before. Elder also testified that Hannah has speech and language delays, and that she sometimes has difficulty understanding directions. Although she was seven or eight years old, she behaved like a five-year-old. He had never seen Hannah's father touch her inappropriately and had never heard Hannah make negative statements about her father.

Jennifer Wendell, a child welfare worker for Alameda County Social Services testified about two interviews with Hannah. The first was conducted on December 17, 2001 after a report that Hannah had been "rubbing herself on other children at least [on] one occasion on the playground and at least one occasion in . . . a bathroom stall."

According to the report prepared for the jurisdictional and dispositional hearing, during this interview Hannah denied that either of her parents touched her genital area, which she referred to as “kiki.” Because the results of that interview were inconclusive as to whether anyone had molested Hannah, the referral was closed.

The second interview occurred on October 17, 2002, after a referral was made that Hannah had been inappropriately touching adults. In that interview, Hannah reportedly told Wendell that her father had touched her genital area, using the term “bay-bay” to refer to her genitals. Hannah also told Wendell that her father “touched his bay-bay to her bay-bay” and that she was scared of her father. Wendell testified that she did not know when Hannah had been touched by her father. She testified that Hannah did not indicate why her father had touched her, and did not know if the touching had occurred when her father bathed her. Wendell was unable to ascertain when Hannah was touched, but Hannah told her that the touching occurred at home, at night, when her mother was in the hospital. Hannah also told Wendell that her father hit her and pulled her hair, that her father hit her with a belt, and that her father hit her baby brother. Wendell did not see any bruising or marks on Hannah’s body, and she was unable to check on the brother.

Wendell arranged to have Hannah interviewed at the Child Abuse, Listening, Interviewing and Coordination Center (CALICO) on October 21, 2002. During the CALICO interview, Hannah was unfocused and distracted. When the interviewer asked her repeatedly who lived in her home, Hannah suddenly volunteered, “I don’t like my daddy.” When the interviewer asked her why she did not like him, Hannah stated that he hurt her back, though she said that she did not know how or where she was when he hurt it. When asked if he had hurt her anywhere else, Hannah pointed to the genital area on a simple drawing of a person. She identified it as her “bay-bay.” The interviewer asked her what she used her “bay-bay” for, and Hannah responded, “Daddy touches.” The interviewer asked what her father had touched her “bay-bay” with. Hannah said that he used his hand. When the interviewer asked how he used his hand, Hannah replied, “It hurt.” When the interviewer tried to get Hannah to show her how her father had touched her using a doll, Hannah would not do so. The interviewer asked Hannah where she was

when her father touched her “bay-bay.” Hannah replied only, “This is bay-bay,” pointing to the drawing. When the interviewer asked Hannah what it felt like when her father touched her “bay-bay,” Hannah responded, “I don’t know.”

Hannah told the interviewer that her clothes were off when her father touched her. When the interviewer gave her a doll and asked Hannah to show her how her father had touched her, Hannah pulled the shirt up and the pants down, pointed to the genital area and said, “This one, right here.” The interviewer then asked, “What did he touch your bay-bay with?” Hannah replied, “That one leg.” The interviewer then asked, “When your daddy touched your bay-bay, did he touch it with his foot, or a stick, or his hand? What did he use?” Hannah replied, “Foot.” When asked if anyone else was there when her father touched her, Hannah said, “My mother has not touched my bay-bay,” and “My mommy’s not like my daddy.” When the interviewer asked if her father did anything else that she did not like, Hannah replied, “I don’t like him.” When the interviewer asked why, Hannah stated, “I don’t know.” The interviewer reminded Hannah that she said her father had hurt her back, then asked if he had hurt her anywhere else. Hannah replied, “No.” (Video at 11:17-11:33.)

Hannah was unable to distinguish between truth and a lie in the interview. The interviewer asked Hannah to identify an object. Hannah correctly identified it as a pencil. The interviewer then asked, “if someone came in and said, ‘Hannah, that’s not a pencil. That’s a pink dinosaur.’ Is that the truth or is that a lie?” Hannah responded, “Pencil.” The interviewer again asked whether it would be the truth or a lie if someone told her it was not a pencil but a dinosaur, and Hannah responded, “Dinosaur.” The interviewer then asked, “Is it good to tell the truth?” Hannah responded, “Yeah.” When then asked “Is it good to tell lies?” Hannah again responded, “Yeah.” (Video at 11:20-11:24.) It was clear during the interview that Hannah had difficulty understanding simple concepts. For instance, when the interviewer asked her to put sticks inside of, on top of, next to, and under a paper bag and a doll, Hannah placed all of the sticks inside the bag or on top of the doll. She also identified the feet on the drawing as “tummy.”

Wendell observed the CALICO interview and testified that Hannah had difficulty distinguishing between truth and lies during that interview. However, she believed that Hannah was telling the truth. Wendell testified that she believed Hannah mentally was five or six years of age.

Ed Diolazo, the school psychologist who assessed Hannah for eligibility for special education services, also testified. Diolazo wrote a report on May 1, 2001 assessing Hannah as below average. He found that Hannah was unable to comprehend directions. However, Diolazo admitted that his opinions regarding Hannah's comprehension were no longer relevant at the time of the November 27, 2002 hearing.

An academic assessment report was prepared on May 24, 2002 by a speech and language pathologist. That report assessed Hannah as being in the first percentile in terms of vocabulary and basic concepts such as location, position, quantity, sequencing, and temporality. An average score would be between the 50th and 63rd percentiles.

There was no evidence of sexual abuse during a medical examination of Hannah.

Mother testified that she lives in San Leandro with her husband, her mother-in-law and brother-in-law. Mother testified that on January 18, 2002 she spent two nights in the hospital when she gave birth to her youngest child. She testified that father spent the night with her in the hospital. When Hannah's brother was born, Hannah was jealous of him and told her mother, "Don't love that baby, just love me." Mother testified that Hannah was not sexually inappropriate with her. She stated that Hannah was never left in the house with father alone; that her sister-in-law stayed in the house with them when mother was at work, but that Hannah would sometimes be alone in the family's bedroom with father. Mother never heard Hannah refer to her genitals as "bay-bay." She testified that Hannah is very physically affectionate, and that she hugs mother often and would grab her thigh when mother was leaving for work. Mother had never seen father hit Hannah or pull her hair, nor had Hannah ever told her that father pulled her hair. She also testified that when she and father visited Hannah after Hannah's removal from the home, Hannah was not fearful of father but ran to him every time she saw him. Mother testified that Hannah "would hug and go over his leg and rub him and sort of hugging

him” but would not touch his genital area, and would hug mother in the same way. Mother testified that she did not believe that Hannah said that father had touched her genitals with his hand and with his penis and that before she went into foster care Hannah had never had a bruise. She testified that for approximately one month before Hannah was removed from the home, Hannah slept in the same bed with mother and father because Hannah’s bed was broken and they could not afford a new one.

Father did not testify, but strongly denied to the social worker that he ever touched Hannah inappropriately. Those statements were included in the social study report.

The dependency investigator assigned to the case also testified that Hannah was not afraid of her father during the supervised visits. She testified that Hannah has not acted out sexually since being placed in foster care, and has not acted out during her visits with her parents. The dependency investigator felt that Hannah “functions more at the level of a four-year-old or five-year-old” than a seven-year-old.

An “Investigation Narrative,” which is part of the clerk’s transcript, also reports that “Hannah buttons and unbuttons her pants in class on a daily basis.” However, there was no testimony to this effect.

On December 11, 2002, the judge stated that he had read and considered the reports, as well as viewed the CALICO tape. Based on that evidence, the court found the allegations of sexual abuse to be true and adjudged Hannah to be a ward of the court. Both parents have timely appealed.

## **DISCUSSION**

The parents first contend that the trial court erred in relying on Hannah’s statement during the CALICO interview that her father had touched her because there were not sufficient indicia of the statement’s reliability, and the statement was the sole evidence that Hannah had been molested by her father. The findings of the juvenile court must be upheld if they are supported by substantial evidence. (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1249-1250.)

At a jurisdictional hearing, “[a]ny legally admissible evidence that is relevant to the circumstances or acts that are alleged to bring the minor within the jurisdiction of the

juvenile court is admissible and may be received in evidence.” (§ 355, subd. (a).) A social study, including any hearsay evidence within it, is admissible and constitutes competent evidence on which a finding of jurisdiction may be based to the extent allowed by section 355, subdivision (c). (Welf. & Inst. Code, § 355, subd. (b).)<sup>2</sup>

Section 355, subdivision (c)(1) provides: “If any party to the jurisdictional hearing raises a timely objection to the admission of specific hearsay evidence contained in a social study, the specific hearsay evidence shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based, unless the petitioner establishes one or more of the following exceptions: [¶] . . . [¶] . . . (B) The hearsay declarant is a minor under the age of 12 years who is the subject of the jurisdictional hearing. However, the hearsay statement of a minor under the age of 12 years shall not be admissible if the objecting party establishes that the statement is unreliable because it was the product of fraud, deceit, or undue influence.” (§ 355, subd. (c)(1); see also Cal. Rules of Court, rule 1450(d).)

Under the plain language of the statute, then, Hannah’s statement was admissible and sufficient by itself to establish that she came within the jurisdiction of the juvenile court because she is under 12 years of age, and there was no showing of fraud, deceit, or undue influence. However, the California Supreme Court has interpreted this provision in light of the parents’ due process rights, and concluded that “the out-of-court statements of a child who is subject to a jurisdictional hearing and who is disqualified as a witness because of the lack of capacity to distinguish between truth and falsehood at the time of testifying may not be relied on exclusively unless the court finds that ‘the time, content and circumstances of the statement provide sufficient indicia of reliability.’ ” (*In re Lucero L.*, *supra*, 22 Cal.4th at p. 1248.) While corroboration of the child’s out-of-court statements is not required, “in the case of a truth incompetent minor, the court may rely exclusively on these out-of-court statements only ‘if the declarant’s truthfulness is so

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<sup>2</sup> Subdivision (d) of section 355 also limits admissibility of evidence in respects not here relevant.



clear from the surrounding circumstances that the test of cross-examination would be of marginal utility . . . .’ ” (*Id.* at p. 1249, quoting *Idaho v. Wright* (1990) 497 U.S. 805, 820.) “The nonexhaustive list of factors that the United States Supreme Court has cited as relevant to the reliability of hearsay statements made by child witnesses in sexual abuse cases are (1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected of a child of a similar age; and (4) lack of motive to fabricate.” (*In re Cindy L.* (1997) 17 Cal.4th 15, 29-30.)<sup>3</sup>

When counsel asked Wendell, “What did Hannah tell you on October 17, 2002?” Mother’s counsel objected, “Hearsay, your Honor. It calls for a hearsay statement.” The trial judge replied, “Well . . . it’s a statement by a minor, right? . . . [¶] So I think it goes in as an exception to the rule in these cases,” and overruled the objection without further hearing on the issue. However, neither parent objected to admission of the tape of the CALICO interview, and affirmatively acquiesced in its admission.

In their briefs on appeal, all parties assume that Hannah was truth-incompetent.<sup>4</sup> The issue was not explored at length at the hearing, and the trial court did not make a specific ruling on the issue. The testimony from Wendell that she did not believe Hannah could distinguish between truth and falsehood was the only testimony relevant to this

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<sup>3</sup> The confrontation clause of the Sixth Amendment is not implicated in the context of a juvenile dependency hearing. “The general rule that hearsay evidence is inadmissible because it is inherently unreliable is of venerable common law pedigree. [Citation.] The rule also has a recognized constitutional dimension, *at least in the criminal context*, because it is related to the confrontation clause of the Sixth Amendment to the United States Constitution. (See *Idaho v. Wright*[, *supra*,] 497 U.S. 805, 813-814.)” (*In re Cindy L.*, *supra*, 17 Cal.4th at p. 27, italics added.) However, the purpose of a dependency hearing is “ ‘not to prosecute a parent, but to protect the child.’ ” (*In re Malinda S.* (1990) 51 Cal.3d 368, 384.)

<sup>4</sup> In her reply brief, mother contends that in her opening brief she “joined in appellant father’s argument that the juvenile court erred in failing to hold a hearing on Hannah’s competence to tell the truth.” However, the argument mother joined was that the “court erred when it admitted the truth-incompetent minor’s hearsay statements because substantial evidence did not show that the statements carried an indicia of reliability.” Obviously, this argument assumed that Hannah was truth-incompetent rather than arguing the point. The issue is waived because it was raised for the first time in mother’s reply brief. (*In re Tiffany Y.* (1990) 223 Cal.App.3d 298, 302-303.) Nevertheless, as described above, there is substantial evidence in the record to support a finding that Hannah was truth-incompetent.

issue, although the juvenile court judge also watched and considered the CALICO tape, which provides strong evidence that Hannah did not understand the difference between truth and falsehood.

In *Cindy L.*, the trial court held a hearing on the issue of competency at which one social worker “testified that she could not specifically recall what she had done to determine whether Cindy understood the obligation to tell the truth, although she had a general routine for questioning children about their understanding of falsehoods, and she believed she had performed this routine with Cindy.” (*In re Cindy L.*, *supra*, 17 Cal.4th at p. 20.) Another social worker “testified only that he had determined Cindy believed lies were bad.” (*Ibid.*) Based on that testimony, the juvenile court concluded that Cindy was not competent when she made her out-of-court statements. (*Ibid.*) The finding of incompetence was not challenged on appeal. In *Lucero L.*, counsel stipulated that Lucero was legally incompetent to testify. (*In re Lucero L.*, *supra*, 22 Cal.4th at p. 1234.) Since the agency does not argue that Hannah was competent to testify, and the only evidence in the record supports the conclusion that Hannah could not distinguish between truth and falsehood, we shall assume that she was truth-incompetent at the time she made her out-of-court statement.

In defending the trial court’s ruling admitting Wendell’s testimony of Hannah’s hearsay statement that her father had touched her genital area, the agency argues that there was substantial evidence to corroborate Hannah’s hearsay statements to Wendell. Under *Lucero L.*, only if the hearsay statement of the minor is the *sole* evidence upon which the court bases its finding of jurisdiction, must there be “particular indications of the statements’ reliability.” (*In re Lucero L.*, *supra*, 22 Cal.4th at p. 1246.) Here, the trial court stated explicitly that it was making its jurisdictional finding based on all of the evidence before it, including the testimony of Pulido and Elder, the earlier reports of Hannah’s inappropriate behavior, as well as upon Hannah’s statements to Wendell and to the CALICO worker. While the testimony of Pulido and Elder might not have been sufficient to establish that Hannah was molested by her father, their testimony does provide corroboration for Wendell’s hearsay testimony. Moreover, this evidence was

significantly bolstered by Hannah’s statements during the CALICO interview, the tape recording of which both parents agreed could be considered by the court. The juvenile court was clear that it was not relying solely on Hannah’s hearsay statements, but also on the statements of the other witnesses and the recorded CALICO interview. Because Hannah’s out-of-court statements were not the sole basis for the jurisdictional finding, we need not decide whether there were sufficient indicia of reliability of Hannah’s hearsay statements.

While the parents have an “important liberty interest in maintaining custody of their child” (*In re Lucero L.*, *supra*, 22 Cal.4th at p. 1247), at a jurisdictional hearing, the court need only find that the child comes within the jurisdiction of the juvenile court by a preponderance of the evidence. (*In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1112.) “If there is any substantial evidence to support the finding of the trier of fact, a court of review must sustain that finding. All reasonable inferences to support the findings of the juvenile court must be made and the record viewed in the light most favorable to the order of the juvenile court.” (*In re Bernadette C.* (1982) 127 Cal.App.3d 618, 624.) The evidence in this case was hardly compelling and the trial court undoubtedly would have been justified in reaching other conclusions. Nonetheless, applying the prescribed standard of appellate review, there was sufficient evidence for the juvenile court to conclude that Hannah was within its jurisdiction, and we must affirm its finding.

### **DISPOSITION**

The jurisdictional order is affirmed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Parrilli, J.